

Ma (Migration) [2018] AATA 662 (16 March 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Lina Ma Master Yulin Zong
CASE NUMBER:	1716465
DIBP REFERENCE(S):	CLF2013/201472 CLF2015/77174
MEMBER:	Christine Kannis
DATE:	16 March 2018
PLACE OF DECISION:	Perth
DECISION:	The Tribunal remits the applications for Partner (Residence) (Class BS) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl.801.221(2)(c) of Schedule 2 to the Regulations • And the secondary applicant meets: • cl.801.321(a)(ii) of Schedule 2 to the Regulations

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 – Sponsor – Primary named applicant's second husband – Second named applicant – Child of the applicant's first marriage – Paternity questioned – DNA testing refused – Financial circumstances – Joint income to pay for day-to-day household expenses – Co-habit with children – Represent themselves to government agencies as a family – Genuine and continuing spousal relationship with each other

LEGISLATION

Migration Act 1958, ss 5F, 65, 359AA
Migration Regulations 1994 r 1.15A Schedule 2 cls 801.221, 801.321
Family Law Act 1975 s90D

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 July 2017 to refuse to grant the applicants Partner (Residence) (Class BS) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) applied for the visa on 14 August 2013 on the basis of her relationship with her sponsor, Mr Shouwang Bian. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2)(c) because the delegate was not satisfied the applicant and sponsor were in a genuine spousal relationship.
4. A copy of the Decision Record was submitted to the Tribunal by the applicant for the purposes of the review.
5. The applicant appeared before the Tribunal on 27 February 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor by telephone. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. Clause 801.221(2)(c) requires that at the time of this decision the applicant continues to be the spouse or de facto partner of the sponsoring partner. The issue in the present case is whether the relationship between the applicant and the sponsor continues to meet the definition of "spouse" in s.5F of the Act.
8. *Background*
9. The applicant arrived in Australia on 1 May 2010 on a Subclass 676 tourist visa. She had been granted the visa on the basis that she would be visiting her then husband (her first husband) who was in Australia on a student visa. Both the applicant and her first husband did not abide by their respective visa conditions to depart on cessation of their visas and they both remained unlawfully in Australia. The second named applicant is a child of the applicant's first marriage.
10. The applicant and the sponsor met on 23 January 2012. They commenced living together in June 2012.
11. On 5 November 2012 the applicant obtained a divorce from her first husband.
12. The applicant and the sponsor were married on 6 May 2013. The applicant gave birth to a child on 24 July 2013. The issue of the paternity of this child has previously been raised by

the Department and the Tribunal notes that the applicant and the sponsor have refused to undertake testing to establish the paternity of the child on the basis that the test is too expensive. At hearing the applicant told the Tribunal that the reason for their refusal to undergo a test is because her husband believes it is an unreasonable request for the Department to have made.

13. On 6 November 2013 the applicant was granted a subclass 820 visa.
14. On 11 December 2015 the Department made a decision to refuse the applicant's Subclass 801 visa on the grounds of not meeting Public Interest Criterion (PIC) 4020. This Tribunal (differently constituted) remitted the application for reconsideration with a direction that the applicant met PIC 4020.
15. Prior to the hearing the applicant provided additional documentation which included but was not limited to joint bank account statements, photos, a Residential Tenancy Agreement and a Financial Agreement. The Tribunal had significantly more information before it than was available to the delegate.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

16. The applicant provided a copy of a Marriage Certificate which showed the applicant and the sponsor were married on 6 May 2013 at Perth, Western Australia. The Tribunal was satisfied that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
17. Section 5F provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis. In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the parties' relationship as well as evidence with respect to the nature of the their household and their commitment to each other, as set out in r.1.15A(3), which is extracted in the attachment to this decision.
18. The Tribunal considered the requirements under r.1.15A(3).

19. *Financial aspects of the relationship*

20. The Tribunal considered the evidence in relation to the financial aspects of the parties' relationship including the joint ownership of assets, any joint liabilities, the extent of pooling of financial resources, any legal obligations owed to the other party and any sharing of day-to-day household expenses.
21. The evidence before the Tribunal included statutory declarations made by the applicant and by the sponsor on 28 June 2017. In her statutory declaration the applicant said both she and the sponsor were working to support their family. She said they used their joint income to pay for their day-to-day household expenses. In his statutory declaration the sponsor said he worked in the construction field and that the applicant worked as a part-time massager. He said they used their joint income to pay for day-to-day household expenses such as the mortgage, food and transport.

22. The applicant told the Tribunal that she works on a casual basis as a cleaner and as a masseuse. The sponsor works on a full-time basis. She said he works for different private businesses but she was unable to name any of his employers.
23. Westpac joint bank account statements for the period from 27 November 2015 to 5 February 2018 were provided.
24. Initially the applicant said the monies deposited in the joint account were comprised of deposits she made using cash given to her by the sponsor and Centrelink monies received for their daughter. She subsequently said that small deposits were also made by other people and then she said small deposits of about \$124 were made by just one friend. The applicant said she and this friend buy things for each other and they often transfer money to each other for these purposes.
25. The applicant said the large deposits, including \$1,000 deposited on 10 October 2017 and \$5,000 deposited on 16 October 2017, were accumulated Centrelink monies. She said the sponsor gives her cash amounts of a few hundred dollars and she deposits them in the joint account.
26. The Tribunal noted that some of the large deposits were referenced by "OJ Plaster". Given that the sponsor works in construction it is likely that these were salary payments.
27. The sponsor told the Tribunal he is sometimes paid in cash and sometimes paid by cheque. He said he gives money to the applicant and she pays their living expenses. He was unable to say what amounts he gives the applicant and said it was no fixed amount.
28. The debit transactions in the joint account statements indicate that the account is used for day-day-expenses including for payment of food, groceries and pharmacy items. The applicant said she uses the joint account to pay for food, clothing and toys.
29. The applicant and the sponsor have no significant joint assets.
30. The Tribunal accepts that the sponsor financially supports the applicant and the children.
31. The evidence of the parties in relation to the financial aspects of their relationship was unsatisfactory and at times inconsistent. The Tribunal does not accept that the parties gave truthful evidence with respect to the sources of the funds in the joint account. Despite this the Tribunal was satisfied that the applicant's financial support of the sponsor is an indicator of a genuine and continuing spousal relationship and placed some weight on this factor.

32. *Nature of the household*

33. The Tribunal considered the evidence in relation to the nature of the household including joint responsibility for care and support of children, the parties' living arrangements and any sharing of housework.
34. In her statutory declaration the applicant said she and the sponsor resided at John Street Bentley, Western Australia (John Street). She said they were responsible for the two children and that she did most of the housework although the sponsor helped her sometimes. In his statutory declaration the sponsor provided similar evidence and also said he helped the applicant with the gardening.
35. The applicant told the Tribunal that she looks after the children because the sponsor leaves for work early each morning six days a week.

36. The Tribunal noted that the sponsor did not attend the hearing in person because he stayed at home with the applicant's daughter because she was unwell.
37. A Residential Tenancy Agreement for the period from 28 October 2017 to 28 October 2018 was provided. The Agreement shows the applicant and the sponsor are the tenants of a property at **Homelea Court Rivervale** (Homelea Court) for the period of the tenancy.
38. The applicant initially told the Tribunal that she and the sponsor lived at **John Street** until November 2017 when **they moved to Homelea Court**. When the sponsor gave his evidence he said the John Street house was demolished in June 2017 and said they had lived at other temporary addresses from June 2017 to November 2017.
39. This information was put to the applicant pursuant to s.359AA of the Act. The Tribunal informed the applicant that subject to her comment or response, the information would be the reason or part of the reason for affirming the decision under review. The applicant said they had stayed with two different friends during the period from June 2017 to November 2017 and she had not told the Tribunal because they were not rental premises, there were no tenancy agreements and she believed they were not legal addresses.
40. The Tribunal accepts the parties' evidence that they resided together at other addresses during the period from June 2017 to November 2017.
41. The Tribunal does not accept the applicant's reason for not disclosing that she and the sponsor left John Street in June 2017. The Tribunal considers it likely that the applicant was seeking to provide evidence favourable to her application for review and this is the reason she was not truthful. Whilst evidence of dishonesty is a cause for concern in relation to the applicant's overall evidence, in this instance there was no significant advantage to be gained by the applicant saying they resided together at John Street until November 2017 when in fact they resided together at other addresses during the period from June 2017 to November 2017.
42. The evidence before the Tribunal included correspondence addressed to the applicant and to the sponsor, both individually and jointly, at John Street and at Homelea Court.
43. The applicant initially told the Tribunal that apart from herself, the sponsor and her two children, no-one else had resided at John Street. The Tribunal put information to the applicant pursuant to s.359AA of the Act in relation to Incoming Passenger cards dated in 2014 and 2015 which showed various persons had indicated that John Street was their intended address in Australia. When asked by the Tribunal the reason why these people had said John Street was their address the applicant said she did not know of any reason.
44. When the sponsor gave evidence he said that various friends of his had lived with them temporarily at John Street. The applicant subsequently told the Tribunal that these friends temporarily lived in a "nanny flat" on the premises however she did not know them or look after them. She conceded that she had not provided truthful evidence in this regard and said her reason for doing so was because she was worried that she would not be able to answer further questions about these people. Again, whilst it is unsatisfactory that the applicant gave untruthful evidence about the temporary occupants of John Street, her evidence, in the Tribunal's view, was motivated by her seeking to provide evidence favourable to her application for review rather than seeking to misrepresent the nature of her relationship with the sponsor.
45. The Tribunal finds that the nature of the household of the applicant and the sponsor is an indicator of a genuine and continuing spousal relationship.

46. *Social aspects of the relationship*

47. The Tribunal considered the evidence in relation to the social aspects of the relationship including whether parties represent themselves to other people as being in a spousal relationship with each other, the opinion of friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities.
48. In her statutory declaration the applicant said she and the sponsor were focussed on raising their children and said they enjoyed staying home with them. She said they still maintained regular contact with their friends and organised gatherings sometimes.
49. In his statutory declaration the sponsor said that because their daughter is very young, he and the applicant do not travel a lot. He said they both enjoyed staying at home with their children and that they kept in regular contact with their friends by having gatherings together.
50. Photos were provided of the applicant and the sponsor with other people including two photos of them sharing a meal with large groups of people. The applicant's daughter and the applicant's son (the secondary applicant) are also in all the photos.
51. Statutory declarations made by two friends of the parties were provided. The reasons the declarants provided for their respective beliefs that the parties were in a genuine and continuing relationship were general in nature. The Tribunal placed no weight on the evidence contained in these statutory declarations.
52. The applicant told the Tribunal that she and the sponsor spend time with close friends on weekends.
53. The evidence before the Tribunal included a Medibank Certificate of Cover dated 19 October 2017 addressed to the sponsor at Homelea Court. The Insured Members are indicated to be the sponsor, the applicant who is identified as his partner and two dependent children, one of who is the secondary applicant and the other being the applicant's daughter.
54. The evidence of social recognition of the parties' relationship was minimal however the Tribunal accepts that they represent themselves to Medicare as being in a genuine and continuing spousal relationship with each other.

55. *Nature of persons' commitment to each other*

56. The Tribunal considered the nature of the persons' commitment to each other including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.
57. The applicant told the Tribunal that if her visa is refused it will mean that their life in Australia will end. She said the sponsor is already suffering hardship because of the visa decision and the property settlement with his former wife (discussed later in this Statement of Decision and Reasons). She said the sponsor prefers to not talk about the visa refusal and the property settlement because they cause him stress. **She said he has had insomnia and lost weight due to stress and she has suggested he seek the help of a psychologist.** The applicant's evidence demonstrated her concern for the sponsor's emotional well-being.
58. The applicant said they had not discussed whether the sponsor would relocate to China if the visa is refused. She said his life and his job are in Australia.

59. The sponsor said that if the visa is refused their family will be broken. He said their marriage would not be over but they wished to stay in Australia.

60. *Other matters*

61. A copy of a document described as a Financial Agreement – Section 90D Family Law Act 1975 was provided. The document was signed by the sponsor and his former wife on 11 December 2017. The document referred to a division of the assets but was, in the Tribunal's view, incomplete and did not include the Schedule A referred to in Clause 6 of the Agreement.
62. The applicant told the Tribunal that in late 2012 the sponsor purchased John Street and that only his name is on the Title Deed. She said the sponsor and his former wife have agreed to rebuild the property after which it will be sold. The proceeds will be divided and after the sponsor's former wife is repaid the costs of rebuilding, she will receive 70% of the proceeds and he will receive 30%. The Agreement refers to such a division in Clause 5.
63. Noting that John Street was purchased after the applicant and the sponsor had commenced living together and only one month before the sponsor and his former wife were divorced, the Tribunal asked the sponsor the reason for dividing the proceeds of sale with his former wife. The Tribunal pointed out that more than 12 months had elapsed since their divorce became final and it is likely that his former wife may have no claim against his property.
64. The sponsor told the Tribunal that the property was purchased using monies his former wife received from China. She paid the deposit and decorating expenses and his name is on the Title Deed because he had borrowing capacity and she did not. He said he had not given any thought as to why both their names were not on the Title Deed. The sponsor said that although he had no marital relationship with his former wife when John Street was purchased, he still had a financial relationship with her at that time.
65. The Tribunal accepts that the sponsor and his former wife were involved in financial matters after he had commenced his relationship with the applicant. The Tribunal accepts that financial gain is likely to have been the motivation for the sponsor and his former wife having a financial relationship after their marital relationship ceased. The Tribunal does not consider that the sponsor's financial relationship with his former wife means that he is not in a genuine relationship with the applicant.

66. *Conclusion*

67. The Tribunal had concerns about the truthfulness of some of the evidence of the parties and noted the applicant's admission that she had not been truthful in giving some of her evidence. The applicant asked the Tribunal to take into account that she may have given confusing answers at times because of the pressure of the visa review process.
68. The Tribunal does not accept all of the evidence of the parties in relation to the financial aspects of their relationship. The evidence in relation to the sources of the monies in the joint account was unsatisfactory. The Tribunal notes the inconsistent evidence given by the applicant in relation to the temporary occupants of John Street. The unsatisfactory evidence and the inconsistencies are likely to arise from the sponsor's financial affairs and do not, in the Tribunal's view, have any significant impact on the issue of the nature of the applicant's relationship with the sponsor.
69. The Tribunal makes no finding in relation to the parties' refusal to undergo a paternity test. The Tribunal does not accept the evidence with respect to the parties' reason for their refusal to undergo a test. The Tribunal however considered the entirety of the evidence including the

requirements under r.1.15A(3) and was satisfied that the applicant and the sponsor jointly care for the child with the sponsor's work commitments precluding him from having equal care of the child. He financially supports the child and he, the applicant, her son and the child are a family unit.

70. Despite its concerns, the Tribunal was satisfied that the applicant and the sponsor are in a genuine spousal relationship. The Tribunal placed weight on the nature of the household and the nature of the parties' commitment to each other. The parties both gave evidence that they see their future together and their relationship as a long term one.
71. Regarding whether the requirements of s.5F are met at the time of decision, the Tribunal decided:
- the parties are married to each other under a marriage that is valid for the purposes of the Act;
 - they are living together;
 - they have a mutual commitment to a shared life as husband and wife to the exclusion of others; and
 - that the relationship is genuine and continuing.
72. Given these findings the Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship. Therefore, the applicant meets cl.801.221(2)(c).
73. The Tribunal is satisfied that the second named applicant meets the secondary criteria for the visa. Clause 801.321(a)(ii) provides that a secondary applicant can meet cl.801.321 if the applicant was the holder of a Subclass 445 visa which ceased on notification of a decision to refuse a subclass 801 visa to the person of whom the applicant is a dependent child or member of the family unit. In this case, the secondary applicant's Subclass 445 visa ceased due to the refusal of the primary applicant's subclass 801 visa. On the evidence, the Tribunal finds at the time of application the secondary applicant was dependent upon the first named applicant. The Tribunal finds therefore that the secondary applicant meets cl.801.321(a)(ii).
74. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

75. The Tribunal remits the applications for Partner (Residence) (Class BS) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations
 - And the secondary applicant meets:
 - cl.801.321(a)(ii) of Schedule 2 to the Regulations

Christine Kannis
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).